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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1957**

**No. 744**

LUTHER CREASY,

*Petitioner,*

vs.

OHIO POWER COMPANY,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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# INDEX


PAGE

Petition for Writ of Certiorari:

Citations to Opinions Below ..... 1
Jurisdiction ..... 2
Questions Presented ..... 2
Constitutional Provision and Statutory Provisions ..... 3
Statement ..... 3
Reasons for Granting the Writ ..... 6
Conclusion ..... 14

Seventh Amendment to the United States Constitution ..... 15
Ohio Revised Code (1953) ..... 15

Appendix:

Judgment Entered in District Court ..... 1 App.
Opinion of Court of Appeals, Sixth Circuit ..... 2 App.
Judgment of Court of Appeals, Sixth Circuit ..... 10 App.


## Table of Cases Cited


*Bosjniak* v. *Superior Sheet Steel Co.*, 145 Ohio 538 (Sup. Ct. Ohio, 1945) .....8, 9, 10, 12, 13

*Davis* v. *Charles Shutrump & Sons*, 140 Ohio 89 (Sup. Ct. Ohio, 1942) ..... 10

PAGE

*Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410 (1941) ..... 11

*Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1937), 2, 6, 11, 13

*Ford Motor Co.* v. *Tomlinson*, 229 F. 2d 873 (1956) .....7, 8, 9, 12

*Hozian* v. *Crucible Steel Casting Co.*, 132 Ohio 453 (Sup. Ct. Ohio, 1937) .....12, 13

*Lavender* v. *Kurn*, 327 U. S. 645 ..... 3, 7

*Lyon* v. *Mutual Benefit Health and Accident Asso.*, 305 U. S. 484 ..... 7

*Pare* v. *Gemco Eng. & Mfg. Co.*, 95 Oh. App. 141 (Ct. of Appeals, Hamilton County, 1953) .....8, 11

*Pennsylvania R. R. Co.* v. *Maslek*, 118 Ohio 644, per curiam affirmance of opinion in 26 Oh. App. 520 (Ct. of Appeals, 1927) ..... 11

*Schwable* v. *C. C. C. & St. L. Ry.*, 102 Ohio 97 (Sup. Ct. Ohio, 1921) ..... 11

*Texarkana* v. *Arkansas, La. Gas Co.*, 306 U. S. 188 (1939) ..... 14

*U. S. Steel Co.* v. *Olewinski*, 235 F. 2d 326 (1956) .....7, 8, 9, 12, 13

*Van Duzen Gas, Etc. Engine Co.* v. *Schelies*, 61 Ohio 298 (Sup. Ct. Ohio, 1899) ..... 11

*Wellman* v. *East Ohio Gas Co.*, 160 Ohio 103 (Sup. Ct. Ohio, 1953) ..... 10

*Wilkinson* v. *McCarthy*, 336 U. S. 53 ..... 3, 7

## Other Authorities Cited

PAGE

Ohio Revised Code (1953):
- Section 4101.11 ..... 3, 8, 9, 15
- Section 4101.12 ..... 3, 8, 9, 15, 16
- Section 4113.04 ..... 3, 16
- Section 4121.01 ..... 3, 16, 17

28 U. S. C. 1254(1) ..... 2

United States Constitution, Seventh Amendment ..... 3, 7, 15

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Comes now the Petitioner, Luther Creasy, and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on November 1st, 1957.

### Citations to Opinions Below

There was no formal opinion by the United States District Court for the Southern District of Ohio, Eastern Division. The judgment entry for that court appears in the Appellant's Appendix, p. 16a, and is set forth at page 1 App. The opinion of the United

States Court of Appeals is reported in 248, F. 2d 745, and is attached hereto in Appendix (pp. 2 to 9 App).

## Jurisdiction

The judgment of the United States Court of Appeals was entered November 1, 1957.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1)

## Questions Presented

1. Under *Erie R. R.* v. *Tompkins,* may a federal court refuse to follow an important question of substantive law of the State of Ohio as determined by the highest court of Ohio?

2. Under *Erie R. R.* v. *Tompkins,* may a federal court erroneously apply an important question of substantive law of the State of Ohio.

3. Under *Erie R. R.* v. *Tompkins,* may a Federal Court ignore the statutes of a State as its substantive law, in a case where jurisdiction in that Court is founded on diversity of citizenship?

4. Where the statutes of the State of Ohio provide that where a workmen sustains injuries by reason of defects in the ways, works, boats, wharves, plant, machinery, appliances or tools, of the employer or one who controls the place of employment, that such proof constitutes prima facie evidence of neglect, may a Federal Court direct a verdict against such workman, at the conclusion of his case consistent with the principles of *Erie R. R.* v. *Tompkins*?

5. Based on the foregoing, may a Federal Court deprive petitioner herein of a trial by jury consistent with the provisions of the Seventh Amendment to the United States Constitution and a consistent line of rulings of this Court, e. g. *Wilkinson* v. *McCarthy*, 336 U. S. 53 and *Lavender* v. *Kurn*, 327 U. S. 645?

## Constitutional Provision and Statutory Provisions

The constitutional provision is the Seventh Amendment to the United States Constitution and is appended hereto at page 15.

The statutory provisions involved are *Ohio Revised Code* (1953), sections 4113.04, 4101.11 and 12 and 4121.01 and are appended hereto at pages 15-17.

## Statement

Except where otherwise indicated, the following statement of the case is taken from the Appellant's Appendix.

Petitioner was an electric lineman since 1929. On June 25, 1952, he was employed by Hoosier Engineering Co., hereinafter referred to as Hoosier) an independent contractor. Hoosier was under a written contract with respondent, a public utility corporation, to set poles, install cross-arms and string in new wire for the purpose of stepping up the voltage in respondent's utility system.

All of the materials going into the work was furnished by respondent, including the cross-arms which had already been creosoted.

The work had been going on for about three weeks. At all times the wires were energized. The contract between Hoosier and respondent called for respondent's engineer to arrange all necessary clearances on the electrical circuits. Clearance is intended as a safety factor, and a simple operation to put in effect, merely requiring that two switches out of three be pulled from a circuit breaker, so that the breaker would operate manually instead of automatically, because if anyone should come in contact with the wires, the remaining switch would kick out and the flow of electricity stopped and stay off until the switch was manually closed.

Petitioner's foreman requested respondent's engineer for clearance on the lines, but the engineer refused to comply with this request.

On the day of the accident it was very warm. The nearest weather bureau disclosed the high temperature at 95°. There was proof that consistently in preceding years at that time of the year similar degrees of temperature were recorded in the area.

Some days before the accident petitioner had a dispute with respondent's engineer about the spacing of clamps and had threatened to quit the job, but was instructed by his foreman to do what respondent's engineer told him to do.

On the day of the accident, petitioner was directed by respondent's engineer to come off some work he was doing and to climb a fifty-five foot pole and to change the spacing on clamps at the upper part of the pole. It was shown that petitioner, in obedience to the order climbed the pole using a standard method

to do so, that when he arrived at his working point he stood on one of the creosoted arms and strapped himself to pole. While in this position he reached around to his right side to get out his safety equipment in order to commence work, and as he did so, because of the slippery condition of the arm, his feet went out off the arm and he was thrown into wires carrying 2300 volts of electricity.

A fellow worker broke his contact with the wires, and other fellow workers lowered him from the pole in an unconscious state. There was proof that there were slip marks on the arm and that on the following morning one of the workers who removed petitioner was directed to go up to the pole again by a safety man and the slip marks were still present and he so reported it.

Petitioner had no recollection of anything following his feet going out off the cross-arm until sometime in July when he was aware of being in a hospital.

As a result of the incident he had his right arm amputated by surgery below the elbow with complete functional loss of the arm to the shoulder. Two fingers on his left hand were amputated and he lost the functional use of another, so that he can only use his thumb and the finger next to it. He cannot dress himself or feed himself without assistance. He also sustained injuries to his head and side, a burn on his body, and severe damage to his nervous system.

At the time of trial in June, 1956, he was still in the hospital, and had been in various hospitals including Veterans Administration hospitals on and off.

At the conclusion of petitioner's proofs the Court granted a motion by respondent to direct a verdict on the ground that there was no proof of negligence.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of dismissal (App., infra, pp. 2 to 10).

The affirmance rests on grounds which does violence to the rule of *Erie R.R.* v. *Tompkins.* It runs contrary to former decisions of the Court, without expressly overruling them and ignores its own holdings in cases cited to support the decision; it ignores the Statute law of Ohio as the substantive law of that State. It is contrary to the substantive law of Ohio, and the substantive law of Ohio was erroneously applied. This is dealt with, infra, under Reasons for Granting the Writ.

## Reasons for Granting the Writ

The Court below has decided a federal question in a manner conflicting with applicable decisions of this Court and has decided an important State question in conflict with applicable State law.

Since the holding of *Erie R. R.* v. *Tompkins,* 304 U. S. 64 (1937) it has been the rule for Federal Courts where jurisdiction is invoked because of diversity of citizenship that the court must follow the substantive law of the State where the cause of action for injuries arose. That opinion turned on the decisional law of the courts as governing the substantive rights therein. In that opinion reference is made to the acts of the Legislature of a State as

being a source of substantive law, but since statute law was not involved in the case, such reference appears to be dicta, unless this court now specifically holds that legislative enactments are substantive law.

Additionally, under the guarantee of the 7th Amendment, and the many cases in which this Court has ruled "that where jury trials are required, courts must submit the issues of negligence to a jury if the evidence might justify a finding either way on those issues." e. g. *Wilkinson* v. *McCarthy,* 336 U. S. 53, *Lavender* v. *Kurn,* 327 U. S. 645.

In *Lyon* v. *Mutual Benefit Health and Accident Asso.,* 305 U. S. 484, this Court granted certiorari dealing with the propriety of a directed verdict in an action based on State law in a diversity matter.

The Circuit Court of Appeals herein based its holding on its former decision in *Ford Motor Co.* v. *Tomlinson,* 229 F. 2d 873 (1956) (App., p. 6) wherein it is stated to have made a careful study of the law of Ohio dealing with the standard of conduct required by the owner of land with regard to the employee of an independent contractor.

Within five months after that decision, the Sixth Circuit decided *U. S. Steel Co.* v. *Olewinski,* 235 F. 2d, 326 (1956) based on *Ford Motor Co.* v. *Tomlinson,* and reached an opposite result, which latter result, we urge, is the correct one, and should have been applied herein.

The results of these cases, and the result in petitioners case have caused an irreconcilable situation and created a state of confusion in the law of Ohio.

*Ford Motor Co.* v. *Tomlinson* was an action brought by the employee of an independent contractor against Ford, who was constructing a building. The plaintiff was injured because a truck used by another independent contractor caused the toppling of a scaffold on which plaintiff was working. He charged Ford with liability pursuant to *Ohio Revised Code* 4101.11 and 4101.12, the so-called "frequenter" statutes, claiming Ford owed him the duty to furnish a safe place to work, and that Ford controlled the work. From an adverse judgment Ford appealed.

The Sixth Circuit reversed the judgment for plaintiff on the facts holding that Ford did not intermeddle in the work and that the injuries were actually caused by the employee of an independent contractor. In its decision it approved the application of the statutes as charged by the trial court and cited *Bosjniak* v. *Superior Sheet Steel Co.,* 145 Ohio 538 (Sup. Ct. Ohio, 1945).

Thereafter in its opinion, the court indulged in dicta and erroneously stated that those statutes were obviously enacted primarily for the benefit of employees, citing *Pare* v. *Gemco Eng. & Mfg. Co.,* 95 Oh. App. 141, and were rendered largely obsolete by the passage of Ohio's Workmen's Compensation law.

The Court cited this precise portion of its *Ford Motor* opinion in Petitioner's case (pp. 8 & 9 App.). It overlooked or failed to accord the language of the statute which protects frequenters as well as employees (p. 15).

Subsequently, in *U. S. Steel* v. *Olewinski,* supra, plaintiff, an employee of an independent contractor

sued U. S. Steel for injuries sustained on its premises and recovered judgment. U. S. Steel appealed because the court refused to direct a verdict against plaintiff. The Sixth Circuit affirmed, and stated that in *Ford Motor Co.* v. *Tomlinson* it took occasion to review the laws of Ohio as to liability of an owner for injuries received on his premises by an employee of an independent contractor with particular reference to the so-called "frequenter" statutes of Ohio. *Ohio Rev. Code* Sections 4101.11 & 4101.12.

It further said, "In the *Tomlinson* case as in *Schwartz* v. *General Electric,* the immediate cause of the accident was the negligence of other employees of an independent contractor over whom the owner exercised no control. *Not only is that factor not present in the instant case, but the dangerous instrumentality that caused the injury here, high-voltage electricty, was within the complete and exclusive control of the appellant.*" (Italics are the court's).

The italicized portion squares precisely with the position of petitioner herein, that respondent had exclusive control of a dangerous instrumentality which caused his injuries.

The cases upon which the court relied in affirming judgment against petitioner erroneously apply Ohio law. One case cited *Bosjniak* v. *Superior Sheet Steel,* 145 Ohio 538 (Sup. Ct. Ohio 1945) not only supports petitioner's position, but was relied on by petitioner at the trial in the District Court and on appeal to the Court of Appeals. In that case plaintiff was employed by an independent contractor, working on defendant's premises when he sustained an electric

shock when a crane came in contact with charged wires. The Ohio Supreme Court held:

> "Concededly the plaintiff, at the time of his injury, was on the premises of defendant as an employee of a contractor then engaged in the erection of a building for defendant. He was, therefore, an invitee of defendant who accordingly owed him the duty to exercise ordinary care to have the premises in a reasonably safe condition for use in a manner consistent with the purpose of the invitation."

*Wellman* v. *East Ohio Gas Co.,* 160 Ohio 103 (Sup. Ct. Ohio 1953) relied on by the court is not applicable herein. The Supreme Court of Ohio distinguished that case from *Bosjniak* and held that the accident was caused by the conduct of a fellow employee of plaintiff, both of whom were employed by an independent contractor and that defendant did not intermeddle or control the work.

*Davis* v. *Charles Shutrump & Sons,* 140 Ohio 89 (Sup. Ct. Ohio, 1942) cited in the decision of the court is equally inapplicable. In fact, the title of the case is misleading. The City of Youngstown was the appellant. The City contracted with a group of independent contractors to erect a bridge as part of its highways. Shutrump was the prime contractor. Plaintiff was working for Bethlehem Steel Co. and was injured on the unfinished bridge. He sued Shutrump and the City of Youngstown. The jury returned a verdict in favor of Shutrump and fastened liability on the City of Youngstown. The City appealed claiming it was engaged in a governmental function and that it exercised no control over the

work, but that Shutrump was actually in control. The Court upheld these contentions and reversed judgment.

*Pare* v. *Gemco Eng. & Mfg. Co.,* 95 Oh. App. 141 (Ct. of Appeals, Hamilton County, 1953) cited (App., p. 9) does not reflect Ohio law applicable herein. The Court there held plaintiff to be a trespasser to whom no duty was owed by defendant.

The Court endeavored to justify its position by factually determining that petitioner's knowledge of the hazard was fully as great as that of Respondent. Such ignores uncontradicted proof that petitioner was ordered to climb the pole by Respondent's engineer. Such order brought petitioner within the protection of Ohio law and specifically created a jury question.

*Van Duzen Gas, Etc. Engine Co.* v. *Schelies,* 61 Ohio 298 (Sup. Ct. Ohio, 1899) which holds:

> "An employee who performs an act apparently dangerous, under direction of his employer or a superior servant, is not prevented from recovering if a person of ordinary prudence would have obeyed such order, if he used ordinary care in obeying it."

Followed with approval in *Pennsylvania R. R. Co.* v. *Maslek,* 118 Ohio 644, per curiam affirmance of opinion in 26 Oh. App. 520 (Ct. of Appeals, 1927); *Schwable* v. *C. C. C. & St. L. Ry.,* 102 Ohio 97 (Sup. Ct. Ohio, 1921).

*Erie* v. *Tompkins* never contemplated so bizarre a situation as now exists herein. That case requires a

Federal court to follow State law, but not to confuse it.

The substantive law of Ohio as defined by its Supreme Court and applicable herein is found in *Bosjniak* v. *Superior Sheet Steel,* supra, also *Hozian* v. *Crucible Steel Casting Co.,* 132 Ohio 453 (Sup. Ct. Ohio, 1937) to the same effect.

After the line of State decisions *Ford Motor* v. *Tomlinson,* supra, came before the U. S. Court of Appeals which court reversed the judgment for plaintiff, and distinguished the case on its facts from Ohio decisions and held that the "frequenter" statutes were properly applied and are in force and effect.

In the same year *U. S. Steel* v. *Olewinski* followed in the same court of Appeals and *Ford* v. *Tomlinson* was cited as the basis for affirming judgment for plaintiff and again reference is made to the "frequenter" statutes and the defendant held liable.

The following year petitioner's case came before the same court, petitioner's legal status being the same as the plaintiff's in the preceding cases. Again the court refers to *Ford* v. *Tomlinson,* but makes no reference to *U. S. Steel* v. *Olewinski,* and now holds that the "frequenter" statutes do not apply; that they were obviously enacted for the benefit of employees and rendered largely obsolete because of the passage of the Ohio Workmen's Compensation law (App., pp. 8 and 9). Yet both statutes were enacted at the same time (1913) and are still contained in the latest revision of Ohio laws (1953).

The *U. S. Steel* case has not been overruled and the principle of that case while available to petitioner was not afforded to him.

By reason of these unharmonized decisions of the U. S. Court of Appeals, Sixth Circuit, what is the law applicable to an employee of an independent contractor who is injured while working by a dangerous instrumentality in the control of the defendant and or his premises?

Which case is to be followed?

If *Erie* v. *Tompkins* has the force it imports to have, what is the effect of *Bosjniak* v. *Supreme Sheet Steel* and *Hozian* v. *Crucible Steel Casting Co.*?

Because of the great industrial activity in the State of Ohio and the proximity of its industrial area to the borders of sister states, it is foreseeable that numerous similar cases may arise based on diversity of citizenship where the same question of law is involved. If the law is permitted to remain in this unpredictable state in the federal courts of Ohio, the consequences can become calamitous and only result in needless litigation and appeals.

The conflict in interpretation of Ohio law by the State Courts and the federal courts in that state amply demonstrate the need for this Court to grant certiorari to clarify the rights of untold numbers of workers who conceivably may be confronted with the same problem.

This court has heretofore acted under similar circumstances. *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U. S. 410 (1941); *Texarkana* v. *Arkansas, La. Gas Co.*, 306 U. S. 188 (1939).

## CONCLUSION

**For the foregoing reasons this petition for writ of certiorari should be granted.**

Respectfully submitted,

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## Seventh Amendment to the United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

## Ohio Revised Code (1953)

4101.11—

Every employer shall furnish employment which is safe for the employees engaged therein, shall furnish a place of employment which shall be safe for the employees therein and for frequenters thereof shall furnish and use safety devises, and safeguards, shall adopt and use methods and processes, follow and obey orders, and prescribe hours of labor reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters.

Approved March 18th, 1913, 103 v. 95.

4101.12—

No employer shall require, permit, or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards or fail to obey and follow orders or to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe. No employer shall fail to do every-

thing reasonably necessary to protect the life, health, safety, and welfare of such employees or frequenters. No such employer or other person shall construct, occupy, or maintain any place of employment that is not safe.

Approved March 18th, 1913, 103 v. 95.

4113.04—

If the employee of any employer referred to in Section 4113.03 of the Revised Code receives any personal injury by reason of any defect or unsafe condition in any ways, works, boats, wharves, plant, machinery, appliances or tools, except simple tools, in any way connected with or in any way used in the business of the employer, such employer is deemed to have had knowledge of such defect before and at the time such injury was so sustained, and when the fact of such defect is made to appear upon the trial of an action brought by such employee or his personal or legal representatives against any such employer for damages on account of such injuries so received, the defect is prima facie evidence of neglect on the part of such employer. The employer may show by way of defense that such defect was not discoverable in the exercise of ordinary care.

Approved May 12th, 1910, 101 v. 195.

4121:01—

As used in sections 4121.01 to 4121.29, inclusive, of the Revised Code:

(A) "Place of employment" means every place, whether indoors or out, or underground, and the premises appurtenant thereto, where either temporarily ~~or~~ permanently any industry trade, or business is carried on, or where any process or operation,

directly or indirectly related to any industry, trade, or business, is carried on and where any person is directly or indirectly employed by another for direct or indirect gain or profit, but does not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power.

(B) "Employment" means any trade, occupation, or process of manufacture or any method of carrying on such trade, occupation or process of manufacture in which any person may be engaged, except in such private domestic service or agricultural pursuits as do not involve the use of mechanical power.

(C) "Employer" means every person, firm, corporation, agent, manager, representative, or other person having control or custody of any employment, place of employment, or employee.

(D) "Employee" means every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to do, or work, or be at any time in any place of employment.

(E) "Frequenter" means every person, other than an employee, who may go in or be in a place of employment under circumstances which render him other than a trespasser.

(K) "Safe" or "safety", as applied to any employment or place of employment, means such freedom from danger to the life, health, safety, or welfare of employees or frequenters as the nature of the employment will reasonably permit, including requirements as to the hours of labor with relation to the health and welfare of employees.

Approved March 18th, 1913.